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No. 91-827

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FARMERS GROUP, INC., *et al.*,
Petitioners,

v.

AMERICAN ASSOCIATION OF RETIRED PERSONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN ASSOCIATION OF RETIRED PERSONS, *ET AL.*

Of Counsel:

STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
SALLY P. DUNAWAY
AMERICAN ASSOCIATION OF RETIRED PERSONS
601 E Street, N.W. - A5-520
Washington, D.C. 20049
(202) 434-2060

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
CHRISTOPHER G. MACKARONIS
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300
Attorneys for Respondents

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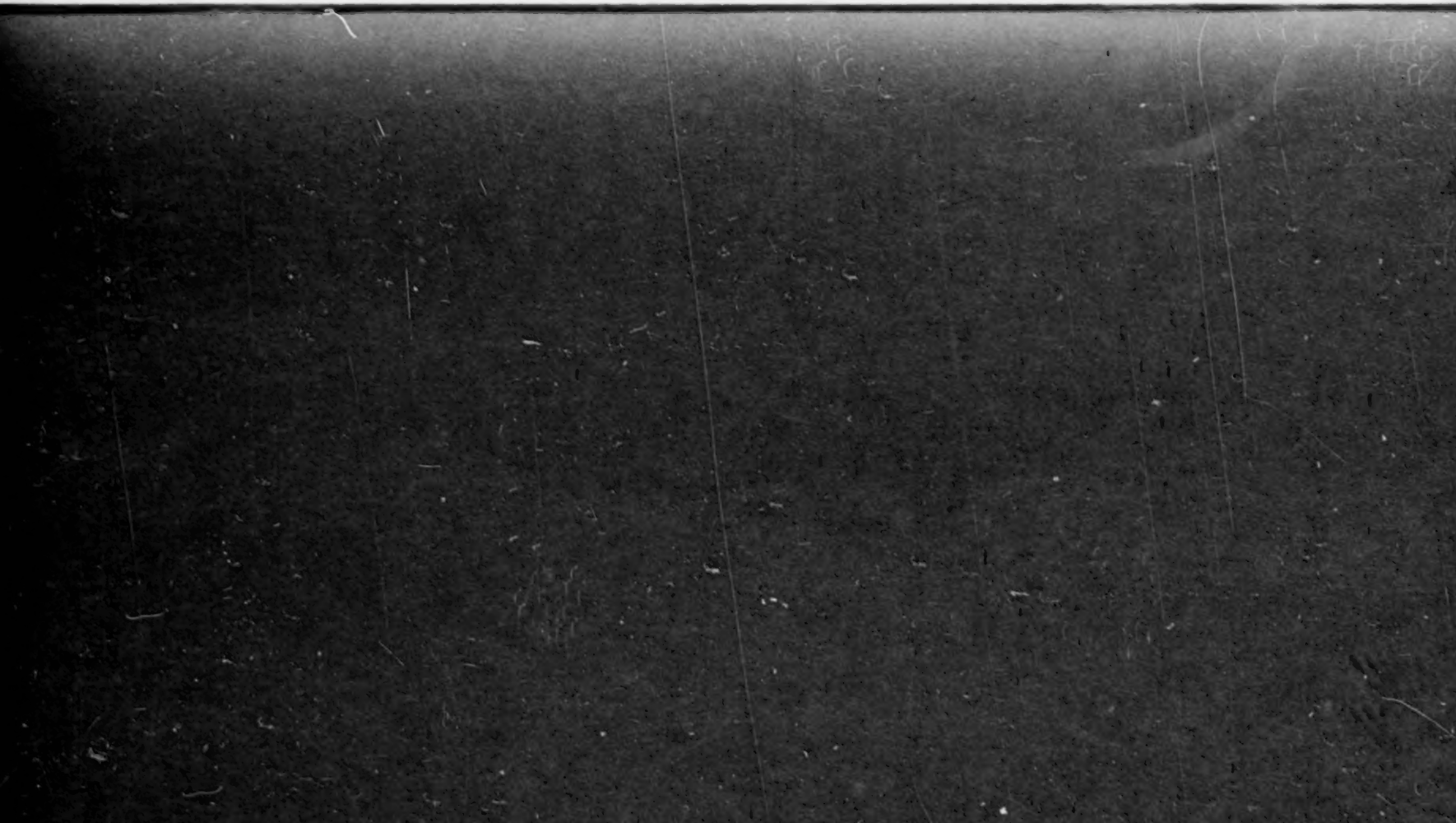

QUESTION PRESENTED

Whether the summary judgment findings below are consistent with this Court's ADEA decisions in *McMann*, *Betts*, and *Thurston*.

RULE 29.1 STATEMENT

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-four million persons age fifty and older, and as such has no parent or subsidiary company.

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BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN ASSOCIATION OF RETIRED PERSONS, *ET AL.*

STATEMENT OF THE CASE

The facts are fully and accurately set forth in the court of appeals' opinion (App. A5-A8, A11-A14, A19) and in the findings of the district court (App. C1-C6). Petitioners' revision of the facts in selective fashion should be disregarded in favor of the complete picture presented in the lower courts' decisions on cross-motions for summary judgment. Two prominent examples of the holes in petitioners' recital of the facts are: (1) petitioners omit mention of the profit sharing plan's immediate payment features utilized by 90 per cent of eligible employees that led the court of appeals to determine that the arrangement was "a hybrid," with "aspects of both a

retirement plan and immediate compensation" (App. A15); and (2) petitioners fail to mention that they took the challenged actions in 1978 without waiting for the legal advice relied upon (App. A19), and took action "for the purpose of driving [older workers] into retirement" (App. A24).

REASONS FOR DENYING THE WRIT

The dispute over post-normal retirement age pension accruals and contributions once loomed as an issue of importance to those individuals working beyond age 65. It now is largely an historical footnote in the law and should not command the attention of this Court. In Title IX of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1973-80 (1986), Congress established definitive ground rules in favor of post-age 65 accruals and contributions. Also, in the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990), Congress overturned *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and overturned the relevant portion of *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

The petition presents no conflict among the circuits on any issue and presents no issue of conflict between this case and the decisions in *McMann*, *Betts*, or *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The lower court decisions here involve routine applications of these cases on the basis of undisputed facts on cross-motions for summary judgment. The petition essentially reargues the undisputed facts affecting a controversy between private parties, and presents no significant legal issues of broader public importance.

I. THERE IS NO CONFLICT WITH *BETTS*

This Court in *Betts* interpreted ADEA Section 4(f)(2), 29 U.S.C. § 623(f)(2), to require a plaintiff to prove that "the discriminatory plan provision actually was

intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." 492 U.S. at 181. Although petitioners complain about the alternative holding by the court of appeals that profit sharing is wages (App. A15), the court of appeals also considered the profit sharing plan to be a "retirement plan" under Section 4(f)(2) in applying the rule in *Betts* (App. A16). The petition presents no issue warranting review because the courts below found on undisputed facts that petitioners intended to discriminate in the nonfringe-benefit aspects of employment. Petitioners deliberated on and made changes in the retirement program in 1978 out of concern for the morale of younger people moving up the employment ladder, and because they wanted age 65 employees to quit (App. A12-A13, A18, C3-C6).

The court of appeals' alternative holding that profit sharing constitutes "wages, too" (App. A15) is likewise consistent with *Betts*.[1] The nonfringe-benefit aspects of employment were defined by this Court to include "hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions" covered in the substantive provisions in ADEA Section 4(a), 29 U.S.C. § 623(a). 492 U.S. at 177. If the differential treatment is in wages, not fringe benefits, the "subterfuge" element of Section

[1] The court of appeals' finding turned on the specific features of the profit sharing plan at issue, including the fact that its "immediate compensation" aspect operated "much like a year end bonus program" (App. A15 n.11). There is no general rule regarding the definitional boundaries of a "plan" under Section 4(f)(2). *See Betts*, 492 U.S. at 175 n.6 ("We express no opinion, of course, on the precise meaning of the phrase 'any bona fide employee benefit plan such as a retirement, pension, or insurance plan.'"). For this reason, the citation to a Title VII regulation (Pet. 8) is inconclusive. The original ADEA interpretations contemplated that profit sharing plans would not qualify as Section 4(f)(2) plans unless their essential purpose is to provide retirement benefits. 29 C.F.R. § 860.120(b) (1970) (App. A15); *see Betts*, 492 U.S. at 174-75 n.6).

4(f)(2) as defined in *Betts* does not come into play, and the discrimination is judged under ADEA Section 4(a). *See* App. A10. *Betts* did not limit or redefine the methods of proof which traditionally have been accepted by the courts in establishing unlawful discrimination in the non-fringe-benefit area under Section 4(a). In this light, and because no legitimate nondiscriminatory reason for petitioners' actions was offered, the court of appeals was correct in holding that petitioners committed a *per se* violation of the ADEA (App. A16).

II. THERE IS NO CONFLICT WITH ERISA OR THE TAX CODE

Petitioners argue that the court of appeals' alternative holding that profit sharing constitutes wages under the ADEA creates potential conflicts with ERISA and the Internal Revenue Code. This argument was not raised below and therefore should not be considered for the first time in this Court. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

Moreover, the Ninth Circuit's alternative holding will cause no harm to the tax-qualified status of this or any other employee benefit plan under ERISA or the Internal Revenue Code. The tax rules are administered pursuant to a different legal scheme. There simply is no reason why the profit sharing plan cannot be a qualified plan under ERISA and yet not meet the independent requirements for a "bona fide employee benefit plan" under ADEA. *Cf.* 44 Fed. Reg. 30648, 30655 (May 25, 1979) (compliance with ADEA interpretation "could not justify non-compliance with this (or any other) provision of ERISA").

Additionally, the judgment regarding the profit sharing plan is wholly sustainable on other grounds which were considered below and are separate from the "wage" holding. First, the court of appeals held that the profit sharing plan was a "retirement plan," but that it was a sub-

terfuge under Section 4(f)(2) (App. A16-A19). Second, with respect to ERISA itself, the district court found that the age cutoff in the profit sharing plan violated the plain language of ERISA that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age. . . ." 29 U.S.C. § 1052(a)(2) (App. C7).[2] *See Puckett v. United Air Lines, Inc.*, 704 F. Supp. 145, 149 (N.D. Ill. 1989).

III. THERE IS NO CONFLICT WITH *MCMANN*

Petitioners' argument that the court of appeals' decision is inconsistent with the "automatic rule" of *McMann* protecting pre-ADEA plan provisions is limited to that aspect of the decision under which the profit sharing plan is considered a Section 4(f)(2) plan. Under the finding that profit sharing is wages, not fringe benefits, there can be no conflict with *McMann* because the *McMann* "automatic rule" is concerned only with Section 4(f)(2) "plan" provisions.

There is no conflict with *McMann* when the profit sharing plan is viewed as a Section 4(f)(2) retirement plan. Petitioners' argument is based on an exaggeration of the findings below on the *McMann* issue. The court of appeals did not hold that the pension and profit sharing plans were to be treated as "one plan" (Pet. 14). The court found that the profit sharing plan was "part of an integrated retirement package" (App. A16), based in part on petitioners' own characterization of the two plans as a "retirement program" (*id.*). Similarly, the court of appeals did not rest its *McMann* holding solely on the fact that petitioners changed the pension plan in 1978, as petitioners assert (Pet. 13). Instead, the court found that "Farmers . . . considered both plans together and decided to do what it could to force people to retire," and "made the entire benefits package as undesirable as possi-

[2] Having sustained the judgment on ADEA grounds, the court of appeals did not reach the ERISA issue (App. A24 n.19).

ble for persons over age 65" (App. A18). The court concluded that "the discrimination against older employees from 1978 forward was carried out by the operation of both plans together" (*id.*).

The "integrated retirement package" rationale is based on undisputed facts. Changes to the "package" in 1978 made the *McMann* rule inapplicable. Petitioners' desire to have this Court reinterpret the same facts in a different manner does not present any issue that should be reviewed by this Court.

Moreover, when an employer acts after passage of the ADEA and revisits, reexamines, modifies, or consciously continues the discriminatory provision, an intent to evade the statute may be present. *See EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 259 (2d Cir. 1982); *Smart v. Porter Paint Co.*, 630 F.2d 490, 495 (7th Cir. 1980); *Puckett*, 704 F. Supp. at 147-48. After extensive examination and consideration of the issue in light of the 1978 ADEA amendments and after recommendations were made to change the profit sharing plan to comply with ADEA, petitioners consciously decided to maintain the discriminatory plan provisions (App. A19). This makes *McMann* inapplicable.

IV. THERE IS NO CONFLICT WITH *THURSTON*

Petitioners' challenge to the finding of a willful violation of the ADEA (App. A19-A20) is based entirely on a reargument of the undisputed facts relied upon by the courts below. In continuing their "febrile arguments" (App. A24) on this point, petitioners omit the critical facts. Not only did petitioners receive legal advice that the profit sharing plan provisions were not authorized under ADEA (App. A19, C4) but, without waiting for the legal advice, issued a bulletin in 1978 announcing a new company policy that employees would be denied further profit sharing if they continued to work past age 65 (*id.*).

The court of appeals was correct in deciding that petitioners' attempt to secure legal advice "in a post hoc manner" did not negate the finding of willfulness, because it was "an attempt to obtain comfort for a course of conduct already decided upon" (App. A20). The court concluded that petitioners acted with "reckless disregard" of the ADEA, "not because the law was entirely clear, but because Farmers acted without bothering to find out what the law required" (*id.*). The decision below thus faithfully applies the *Thurston* standard, and presents no issue meriting consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
SALLY P. DUNAWAY
AMERICAN ASSOCIATION OF
RETIRED PERSONS
601 E Street, N.W. - A5-520
Washington, D.C. 20049
(202) 434-2060

RAYMOND C. FAY
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THOMAS R. GIBBON
CHRISTOPHER G. MACKARONIS
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300
Attorneys for Respondents

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